

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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ROYAL E. JORGENSEN and MARY M. JORGENSEN,  
*Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

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On Petition for Review of the Order of the Tax Court  
of the United States

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BRIEF FOR THE RESPONDENT

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FILE

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IN THE  
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No. 15356

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*

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On Petition for Review of the Order of the Tax Court  
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BRIEF FOR THE RESPONDENT

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OPINION BELOW

The Tax Court rendered no opinion.

JURISDICTION

This case involves a deficiency in federal income taxes for the calendar year 1952. (R. 7-8.) On October 20, 1955, the Commissioner mailed to taxpayers a notice disclosing a deficiency in the amount of

\$2,917.14, plus penalties in the amount of \$439.68. (R. 8, 9.) On January 23, 1956, taxpayers filed a petition with the Tax Court for redetermination (R. 3) under the provisions of Section 272 (a)(1) of the Internal Revenue Code of 1939.<sup>1</sup> The order of the Tax Court dismissing taxpayers' petition was entered on April 30, 1956. (R. 12.) The case is brought to this Court by petition for review filed on July 26, 1956. (R. 3.) Jurisdiction is conferred on this Court by Section 7482, Internal Revenue Code of 1954.

### QUESTION PRESENTED

Whether filing a petition for redetermination is deemed timely under the provisions of Section 272 (a)(1) of the 1939 Code and Section 7502 (a) of the 1954 Code when the petition is mailed and the date of the United States postmark stamped on the envelope containing the petition is not within the 90-day period prescribed by Section 272 (a)(1) of the 1939 Code for filing a petition for redetermination.

### STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent statutes and other authorities involved may be found in the Appendix, *infra*.

### STATEMENT

The Commissioner determined a deficiency in taxpayers' income taxes for the calendar year 1952. (R.

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<sup>1</sup> Section 272 (a)(1), Internal Revenue Code of 1939 is applicable because Section 7851 (a)(6) of the Internal Revenue Code of 1954 (Appendix, *infra*) continues the notice of deficiency and petition to the Tax Court procedures of Section 272 (a)(1) with respect to taxes imposed by the 1939 Code with the exception of treating timely mailing as timely filing whenever Section 7502 of the Internal Revenue Code of 1954 applies.

7-8.) A notice of deficiency was sent to taxpayers by registered mail on October 20, 1955. (R. 9.) Taxpayers' petition for redetermination was filed with the Tax Court on January 23, 1956 (R. 3), which was the 95th day after the notice of deficiency was mailed. The United States postmark stamped on the envelope containing the petition was dated January 20, 1956 (R. 9), which was the 92d day after the notice of deficiency was mailed. The 90th day after the notice of deficiency was mailed was neither a Saturday, Sunday nor legal holiday in the District of Columbia.

The Commissioner filed a motion to dismiss the petition on the ground that the Tax Court lacked jurisdiction since the taxpayers failed to file the petition for redetermination within 90 days after the notice of deficiency was mailed to them. (R. 9-10.) The Tax Court granted the Commissioner's motion (R. 12) and taxpayers appeal from this order.

### **SUMMARY OF ARGUMENT**

In order for the Tax Court to acquire jurisdiction, a petition for redetermination must be filed with that Court within 90 days after a notice of deficiency is mailed. To file a petition with the Tax Court means actual delivery of the petition to the Tax Court. The petition in this case was delivered to the Tax Court on the 95th day after the notice of deficiency was mailed. Therefore, the petition was not filed within the prescribed 90-day period.

The undisputed facts show that Section 7502 (a) is inapplicable. That section specifically provides that it shall apply only if the postmark date stamped on the envelope containing the petition falls on or before the prescribed date for filing. Here, the date of the



postmark is two days after the expiration of the 90-day period.

Taxpayers' arguments concerning procedure and the Constitutional objections raised are without merit. Accordingly, the Tax Court correctly dismissed the petition for redetermination for lack of jurisdiction.

### ARGUMENT

#### **The Tax Court Correctly Dismissed the Petition for Redetermination for Lack of Jurisdiction Because the Petition Was Not Timely Filed in Accordance With the Provisions of Section 272 (a)(1) of the 1939 Code as Modified by Section 7502 (a) of the 1954 Code**

When a deficiency is asserted by the Commissioner, taxpayer may seek a redetermination by filing a petition with the Tax Court. Section 272 (a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*). The petition must be filed within 90 days after the date a notice of deficiency is mailed. Section 272 (a)(1). Taxpayer argues that the filing requirement is not jurisdictional. (Br. 7.) However, as this Court stated in *Di Prospero v. Commissioner*, 176 F. 2d 76, 77 (C.A. 9th): "There is, at this late date, little doubt that the 90 day requirement is jurisdictional." Thus, the Tax Court did not acquire jurisdiction to redetermine the deficiency unless the petition was filed within the prescribed 90-day period. *Di Prospero v. Commissioner, supra*.

To file a petition with a Tax Court pursuant to Section 272 (a)(1) means actual delivery of the petition to the Tax Court within the prescribed 90 days.<sup>2</sup> *Di Prospero v. Commissioner, supra; Stebbins' Estate v.*

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<sup>2</sup> Mailing the petition is neither delivery nor filing. *Lewis-Hall Iron Works v. Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592.



*Helvering*, 121 F. 2d 892 (C.A. D.C.); *Poyner v. Commissioner*, 81 F. 2d 521 (C.A. 5th). The petition in this case was not actually delivered to the Tax Court until January 23, 1956, which was the 95th day after the notice of deficiency was mailed. (R. 9.) Taxpayers' time for filing the petition expired on January 18, 1956, which was neither a Saturday, Sunday nor a legal holiday in the District of Columbia. Thus the petition in this case was not timely filed in accordance with Section 7502 (a) (1) which required actual delivery of the petition to the Tax Court within the 90-day period. *Di Prospero v. Commissioner, supra*; *Worthington v. Commissioner*, 211 F. 2d 131 (C.A. 6th); *Galvin v. Commissioner*, 239 F. 2d 166 (C.A. 2d).

Section 7502 (a) of the Internal Revenue Code of 1954<sup>3</sup> (Appendix *infra*) temporizes the requirement of actual delivery. However, the section states:

This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, \* \* \*.

The petition here was postmarked on January 20, 1956 (R. 9) which was the 92d day after the notice of deficiency was mailed. This was two days *after* the expiration of the prescribed 90-day period. Therefore, Section 7502(a) does not apply. *Galvin v. Commissioner, supra*; *Lingham v. Commissioner*, (C.A. 3d), decided April 10, 1957.

In the recent case of *Galvin v. Commissioner, supra*, the date of the postmark on the envelope containing

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<sup>3</sup> Section 7502(a) of the 1954 Code is effective even as to taxes imposed by the 1939 Code so long as the mailing, as here, occurred after August 16, 1954. Section 7851 (a) (6) (C) (v) (Appendix, *infra*).

taxpayer's petition for redetermination was the 91st day after the notice of deficiency was mailed. The petition was filed with the Tax Court on the 92d day after the notice of deficiency was mailed. The Court of Appeals for the Second Circuit held that Section 7502 (a) did not apply since the postmark date was not within the prescribed 90-day period. Consequently, the Tax Court was without jurisdiction since the petition was not filed within 90 days as required by Section 6213 (a) of the Internal Revenue Code of 1954.<sup>4</sup> The *Galvin* case is not materially different from the present case and the Tax Court's action in the present case is consistent with the Second Circuit's holding in the *Galvin* case. Accord: *Lingham v. Commissioner, supra*.

Accordingly, the Tax Court correctly dismissed taxpayers' petition for redetermination for lack of jurisdiction because the petition was not timely filed in accordance with Section 272 (a)(1) of the 1939 Code as modified by Section 7502(a) of the 1954 Code.

Taxpayers argue that the Commissioner's motion to dismiss was not filed within 45 days after the petition for redetermination was served (Br. 4-5) but, as their citation of the Tax Court's rules show, this argument is without merit. There is no doubt that the Tax Court is authorized to promulgate its own rules of practice and procedure. Section 7453 of the Internal Revenue Code of 1954 (Appendix, *infra*). While Rule 14 (a) of the Rules of Practice, Tax Court of the United States (Appendix, *infra*) states 45 days as the time within which the Commissioner may move with respect to the petition, Rule 20 (a), Rules of

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<sup>4</sup> Section 6213 (a) of the 1954 Code is substantially the same as Section 272 (a)(1) of the 1939 Code which is involved here.

the Tax Court (Appendix, *infra*), permits an extension of time as the Tax Court in its discretion may decide. Taxpayers' petition was received by the Commissioner on January 24, 1956. (R. 9.) The Commissioner's motion was filed on March 19, 1956. (R. 10.) It is implicit in the Tax Court's action of granting the Commissioner's motion that the time was enlarged. In any event, the Tax Court's action is proper since it may dismiss a case upon its own motion. Rule 21, Rules of the Tax Court (Appendix, *infra*).

Taxpayers also argue that they are in the same position as a defendant in a civil case. (Br. 5, 9.) The analogy is inapposite because, in the first place, it is clear that the Commissioner is required to assess taxes imposed by the Internal Revenue Code (Section 6201 of the 1954 Code) within the period of limitations prescribed. Section 275 (a) of the 1939 Code. A notice of deficiency is a prerequisite to assessment. Section 272 (a)(1) of the 1939 Code. Taxpayer is permitted to seek a redetermination of the deficiency by filing a petition with the Tax Court. Section 272 (a)(1) of the 1939 Code. Thus, *taxpayer initiates* the proceedings in the Tax Court and becomes the *petitioner* in accordance with the Code and the Tax Court's rules. See Rules 6 and 7, Rules of the Tax Court (Appendix, *infra*). The Commissioner is the *respondent*. Rule 6, Rules of the Tax Court. No transformation occurs simply because taxpayer files a petition for redetermination after the expiration of the 90-day period.

Secondly, taxpayers' analogy of themselves to a defendant in a civil case is predicated upon the assumption that the hypothetical complaint was itself filed within the period of limitation so as to confer jurisdic-

tion upon the court.<sup>5</sup> Taxpayers' petition for redetermination here was not filed within the period of limitations of 90 days so as to confer jurisdiction upon the Tax Court. Therefore, since the basic assumption upon which the analogy is predicated is not true in this case, the analogy is inapposite.<sup>6</sup>

The procedure in this case does not contravene basic principles of "our whole system of law" as taxpayers argue (Br. 5), for in any case an aggrieved party's remedy may be barred upon the expiration of the period of limitations within which a remedy might have been pursued. This is not a contravention of an accepted tenet; on the contrary, it is one of our accepted tenets of jurisprudence. 2 <sup>Coleley</sup> ~~Coley~~, Constitutional Limitations, 760-765 (8th ed., 1927); Restatement of Judgments (1942), Sections 47 (e), 49 (a).

Taxpayers further argue that dismissal of their petition by the Tax Court compels them to pay a tax which is arbitrary and incorrect and, since they are denied a hearing on the merits, they are thereby deprived of due process of law guaranteed by the Fifth

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<sup>5</sup> It necessarily follows that if the complaint was not filed within the period of limitation, the court would not have jurisdiction to determine the merits and a judgment on the merits would be void. 1 Freeman, Judgments (5th ed., 1925), Sections 288, 333, 338; Restatement of Judgments (1942), Section 7.

<sup>6</sup> Taxpayers' argument with respect to hardship (Br. 5, 9) is, of course, an equitable argument. However, it is the congressional prerogative to establish the time within which a proceeding may be initiated in the Tax Court. See *Brushaber v. Union Pac. R. R.*, 240 U.S. 1; *Federal Grain Co. v. United States*, 35 F. 2d 260 (W.D. Mo.); *Vance v. Vance*, 108 U.S. 514. That time has been established in Section 272 (a) (1) of the 1939 Code as modified by Section 7502 (a) of the 1954 Code which does not permit an extension predicated upon either the presence or absence of hardship.

Amendment to the Constitution of the United States. (Br. 5-7.) This argument is plainly without merit since a proceeding in the Tax Court is not taxpayers' single recourse. See Sections 322 (b)(1) and 3772 (a)(2) of the 1939 Code and Section 7422 (a) of the 1954 Code. See also 28 U.S.C., Sections 1346 (a), 1491.

### CONCLUSION

The absence of timely filing prevented the Tax Court from acquiring jurisdiction. Consequently, taxpayers' petition for redetermination was properly dismissed and the order of the Tax Court should be affirmed.

Respectfully submitted,

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APRIL, 1957



## APPENDIX

## INTERNAL REVENUE CODE OF 1939:

## SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. \* \* \*

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 272.)

## INTERNAL REVENUE CODE OF 1954:

## SEC. 7453. RULES OF PRACTICE, PROCEDURE, AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe \* \* \*.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7453.)

## SEC. 7502. TIMELY MAILING TREATED AS TIMELY FILING.

(a) *General Rule*.—If any claim, statement, or other document (other than a return or other document required under authority of chapter 61), required to be filed within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such claim, statement, or other document is required to be filed, the date of the United States postmark stamped on the cover in which such claim, statement, or other document is mailed shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of the claim, statement, or other document, determined with regard to any extension granted for such filing, and only if the claim, statement, or other document was, within the prescribed time, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, office, or officer with which the claim, statement, or other document is required to be filed.

\* \* \* \*

(26 U.S.C. 1952 ed., Supp. II, Sec. 7502.)

## SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules*.—Except as otherwise provided in any section of this title—

\* \* \* \*

(6) *Subtitle F*.—

(A) *General rule*.—The provisions of subtitle F shall take effect on the day after the date of enactment of this title and shall be applicable with respect to any tax imposed by this title. The pro-



visions of subtitle F shall apply with respect to any tax imposed by the Internal Revenue Code of 1939 only to the extent provided in subparagraphs (B) and (C) of this paragraph.

(B) *Assessment, collection, and refunds.*—Notwithstanding the provisions of subparagraph (A), and notwithstanding any contrary provision of subchapter A of chapter 63 (relating to assessment), chapter 64 (relating to collection), or chapter 65 (relating to abatements, credits, and refunds) of this title, the provisions of part II of subchapter A of chapter 28 and chapters 35, 36, and 37 (except section 3777) of subtitle D of the Internal Revenue Code of 1939 shall remain in effect until January 1, 1955, and shall also be applicable to the taxes imposed by this title. On and after January 1, 1955, the provisions of subchapter A of chapter 63, chapter 64, and chapter 65 (except section 6405) of this title shall be applicable to all internal revenue taxes (whether imposed by this title or by the Internal Revenue Code of 1939), \* \* \*.

(C) *Taxes imposed under the 1939 Code.*—After the date of enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:

\* \* \* \*

(iv) Chapter 76, relating to judicial proceedings.

(v) Chapter 77, relating to miscellaneous provisions, except that section 7502 shall apply only if the mailing occurs after the date of enactment of this title, and section 7503 shall apply only if the last date referred to therein occurs after the date of enactment of this title.

\* \* \* \*

(26 U.S.C. 1952 ed., Supp. II, Sec. 7851.)

RULES OF PRACTICE TAX COURT OF THE UNITED STATES  
(Revised January 15, 1957):

RULE 6. PROPER PARTIES

A case in the Tax Court shall be brought by and in the name of the person against whom the Commissioner determined the deficiency (or liability, as the case may be), or by and in the full descriptive name of the fiduciary legally entitled to institute a case on behalf of such person.

\* \* \* \*

The Commissioner shall be named as the respondent.

RULE 7. INITIATION OF A CASE—PETITION—FILING  
FEE—FORM

(a) *Petition.*—

(1) *Filing.*—A case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed. (See Rules 4 and 6.)

\* \* \* \*

*Petition*

(B) Numbered paragraphs stating:

1. Petitioner's name and principal office or residence, and the office of the director or district director of internal revenue in which the tax return for the period in controversy was filed.

\* \* \* \*

6. A prayer, setting forth relief sought by the petitioner.

(C) The signature of the petitioner or that of his counsel. (See Rule 4 (f).)

(D) A verification by the petitioner; \* \* \*

\* \* \* \*

## RULE 14. ANSWER

(a) *Time to answer or move.*—The Commissioner, after service upon him of the petition, shall have 60 days within which to file an answer or 45 days within which to move with respect to the petition.

\* \* \*

\* \* \* \*

## RULE 20. EXTENSIONS OF TIME

(a) An extension of time (except for the absolute time limit on filing of the petition, see section 6213 (a), Code of 1954, and except as otherwise provided in these Rules) may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth good and sufficient cause therefor or may be ordered by the Court upon its own motion.

\* \* \* \*

## RULE 21. DISMISSAL

A case may be dismissed for cause upon motion of either party or of the Court. \* \* \*